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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 713

JOSE CASES VELAZQUEZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH R. FRANCIS,
EDGAR S. BELAVAL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 713

JOSE CASES VELAZQUEZ,
Petitioner and Appellant below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a criminal action brought in the District Court of the United States for Puerto Rico by the United States of America, respondent herein, against José Cases Velázquez, petitioner herein, charging, in four counts, a violation of sections 1, 2e and 2f of the Federal Firearms Act, 52 Stat.

1250, 15 U. S. C. A. 901-909, by transporting and receiving a firearm and ammunition after having been convicted of a crime of violence. (Transcript of Record, pp. 1-4). Trial was by jury and a verdict was rendered against the accused, petitioner herein, finding him guilty on all four counts (Transcript of Record, p. 6). Accused, petitioner herein, was sentenced to three years imprisonment on the first count, three years on the second, five years on the third and five years on the fourth, the first two sentences to run consecutively and the last two concurrently but consecutive to the first two. The last two sentences were suspended (Transcript of Record, pp. 7-8). An appeal from said verdict and judgment was taken by the accused, petitioner herein, to the Circuit Court of Appeals for the First Circuit (Transcript of Record, pp. 8-11), which affirmed the judgment of the District Court of the United States for Puerto Rico (Judgment of the Circuit Court of Appeals, Transcript of Record, p. —). The principal questions involved in said appeal were:

1. The court erred in overruling defendant's motion to postpone the oral argument on the demurrer to the indictment.

2. The court erred in overruling defendant's demurrer to the indictment.

3. The court erred in overruling defendant's motion to be allowed time to file a motion for a bill of particulars.

4. The court erred in overruling defendant's motion for a bill of particulars.

5. The court erred in overruling defendant's motion to postpone trial.

6. The court erred in refusing to permit defendant to ask jurors, during their examination, whether they had served on juries in the Insular courts.

7. The court erred in refusing to permit defendant to investigate by questions to jurors, during their examination, whether they had any personal affairs pending which, because of their nature, might worry them so much that it would prevent them from dedicating their full attention to the case to be tried.

8. The court erred in limiting defendant, in his inquiries into the mental state of the jurors, to asking the question whether the juror was in a position to give the case a fair and impartial trial.

9. The court erred, over objection and exceptions of defendant's counsel, in refusing to permit the examination of defense witness, Fernando Gallardo Díaz, as to whether, as Insular District Attorney, he had prosecuted or arrested defendant or anybody else for the shooting affair during the course of which defendant was alleged to have been carrying a revolver.

10. The court erred in refusing defendant's counsel sufficient time to sum up the case to the jury.

11. The verdict was contrary to the law and facts in that:

(a) The only previous conviction shown by the evidence was one for aggravated assault and battery under Puerto Rican law, which is not one of the crimes listed in the Federal statute as crimes of violence.

(b) As to the first count of the indictment, for receiving the ammunition, the evidence shows that the reception was the start, and part of the transportation alleged in the second count; except for the invalid presumption created by law, it does not show that the ammunition had been shipped or transported in interstate or foreign commerce; and, it does not show that the ammunition was of the kind whose reception is prohibited by the statute.

(c) As to the second count of the indictment for transporting the ammunition, the evidence does not

show transportation from one jurisdiction to another in interstate or foreign commerce and does not show that it was the kind of ammunition whose transportation is prohibited by the statute.

(d) As to the third count of the indictment, for receiving the revolver, the evidence, except for the invalid presumption created by law, does not show that the revolver was shipped or received in interstate or foreign commerce, showing mere possession by defendant.

(e) As to the fourth count in the indictment, for transporting the revolver, the evidence shows possession by defendant at a designated place, on the date alleged in the indictment. As to other transportations, there is a fatal variance with the date and place alleged in the indictment. Except for the invalid presumption created by law, there is no evidence to show transportation from one jurisdiction to another in interstate commerce.

(f) The evidence does not show that the acts of transportation or reception alleged in the four counts of the indictment took place within the jurisdiction of this court or within the jurisdiction of the United States.

12. The court erred in overruling defendant's motion in arrest of judgment.

And by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

These questions were decided by said Circuit Court of Appeals for the First Circuit and materially affected the determination of said appeal (Opinion of the Circuit Court, Transcript of Record, p. 40).

II.

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals holding, (a) that the Federal Firearms Act is valid, (b) that the decision in the case of *United States* v. *Miller,* 307 U. S. 174, did not mean to formulate a general rule and that, if it did, said decision is invalid, and (c) that a conviction for aggravated assault and battery under Puerto Rican law is a crime of violence under the meaning of the Federal Firearms Act, involves an important question of Federal law which has not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals holding that the Federal Firearms Act is not ex post facto even when the previous conviction for a crime of violence happened before the law was approved, is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court, especially the decisions in the cases of *Cummings* v. *Missouri,* 4 Wall. 277, *Ex Parte Garland,* 4 Wall. 377, and *Pierce* v. *Carskadon,* 16 Wall. 234. Also, the decision holding that the limitations imposed by the Second Amendment to the Constitution are not applicable to .38 caliber revolvers is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court, particularly the decision in the case of *United States* v. *Miller,* 307 U. S. 174.

3. The decision of the Circuit Court of Appeals holding (a) that the Federal Firearms Act is not an ex post facto law, (b) that the Federal Firearms Act does not deny equal protection of laws, (c) that the Federal Firearms Act does not create an unreasonable presumption of guilt, (d) that the Federal Firearms Act is not an undue extension of the power to regulate interstate commerce, (e) that the limita-

tions of the Second Amendment to the Constitution do not apply in this particular case and (f) that the verdict was not found on insufficient evidence, involves a decision of constitutional questions which have not been, but should be, decided by this Court.

4. The decision of the Circuit Court of Appeals, holding that a conviction under Puerto Rican law for the crime of aggravated assault and battery is a conviction for the crime of assault with intent to commit a battery and a conviction for the crime of assault and battery, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

5. The decision of the Circuit Court of Appeals holding, (a) that a conviction for an assault and battery is a conviction for an assault with intent to commit a battery and a conviction for an assault and battery, and (b) that there was no need of additional evidence to prove the character of the ammunition supposed to have been transported by the accused, is an erroneous decision on an important question of general law which should be reviewed by this Court.

III.

Jurisdiction.

1. The date of the judgment to be reviewed is November 27, 1942 (Transcript of Record, p. 52).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. C. A. § 347 (c).

3. The Federal statute whose validity is involved is the Federal Firearms Act, especially sections 1, and 2(e) and (f), c. 850, § 1 and 2, 52 Stat. 1250. Section 2(e) of this act makes it a crime for a person who has been previously convicted of a crime of violence, to transport or cause to be

transported in interstate commerce any firearm or ammunition; section 2(f) makes it a crime for a person who has been previously convicted of a crime of violence, to receive any firearm or ammunition which has been shipped in interstate commerce; section 1 (1) defines interstate commerce in the usual way, but adds that commerce within any territory or possession or the District of Columbia shall be considered interstate commerce; section 1 (2) defines a firearm as any weapon designed to expel a projectile by the action of an explosive; section 1 (1) defines a crime of violence as: murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year; and section 1 (8) defines ammunition as including only pistol or revolver ammunition and not including shotgun shells, rifle ammunition or any .22 caliber rimfire ammunition.

4. This is a criminal case in which petitioner herein was convicted by the District Court of the United States for Puerto Rico, appealed to the Circuit Court of Appeals for the First Circuit and the Circuit Court affirmed the judgment of the District Court.

IV.

Questions Presented.

1. Validity of the Federal Firearms Act. It is submitted that this act is, at least partially, invalid and unconstitutional because:

(a) It is ex post facto when applied to persons whose conviction for a crime of violence was previous to the adoption of the law. By this law, the right of a person to keep and bear arms is taken away from him because of a crime committed before the adoption of the law.

(b) It is a limitation of the right to keep and bear arms, prohibited by the Second Amendment to the Federal Constitution.

(c) It is an undue extension of the interstate commerce clause of the Federal Constitution in that Congress has arbitrarily classified as interstate commerce, commerce completely within the local jurisdiction of a territory or possession and seeks to control goods which have lost their interstate character.

(d) It creates an invalid presumption of transportation or reception in interstate commerce from the mere possession of a firearm or ammunition.

(e) If interpreted as it was interpreted by the Circuit Court, it is discriminatory in that of two persons, both of whom have been convicted of a crime of violence, one may not be punished, while the other one is, because in one of the jurisdictions the crime committed was not punishable by imprisonment for more than one year.

2. Sufficiency of the indictment. It is submitted that the indictment was insufficient because:

(a) The previous conviction alleged is not a crime of violence under the meaning of the Federal Firearms Act.

(b) The first and third counts do not allege, sufficiently, reception of firearms and ammunition in interstate commerce.

(c) The second and fourth counts do not allege, sufficiently, transportation of firearms or ammunition in interstate commerce.

3. Sufficiency of the evidence as to the first two counts. It is respectfully submitted that:

(a) There was no proof that the ammunition received or transported was of the prohibited kind.

(b) There was, as to the ammunition, only one transaction shown.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the First Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 3756, José Cases Veláquez, appellant v. United States of America, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court, and for such further relief as to this court may seem proper.

San Juan, Puerto Rico, December 25, 1942.

HUGH R. FRANCIS,
EDGAR S. BELAVAL,
Attorneys for the Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals (Record, p. 40) was given on November 27, 1942. So far, it is not known to be reported.

II

Jurisdiction.

1. The date of the judgment to be reviewed is November 27, 1942.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is the Act of February 13, 1925, C. 229, § 1 (a), 43 Stat. 938.

3. The opinion of the Circuit Court of Appeals for the First Circuit, interprets the Federal Firearms Act, c. 850, § 1-9, 52 Stat. 1250, a federal statute which has not, as yet, been interpreted by this court; it raises constitutional questions to ex post facto laws, the interstate commerce clause and the right of the people to keep and bear arms; it is believed to interpret the Second Amendment to the Federal Constitution and the prohibition as to ex post facto laws in a manner which is in conflict with cases already decided by this court; it is believed to have erred in deciding questions of general law, and it has decided questions of the local law of Puerto Rico in a manner believed to be in conflict with Puerto Rican decisions.

III

Statement of the Case.

The petitioner herein was charged in the District Court of the United States for Puerto Rico, with a violation of

the Federal Firearms Act (Transcript of Record, pp. 14). The indictment consisted of four counts: the first count charged the defendant with receiving, after having been convicted of a crime of violence, a certain amount of revolver ammunition which had theretofore been shipped and transported in interstate commerce (Transcript of Record, pp. 1 and 2); the second count charged the defendant with transporting, after having been convicted of a crime of violence, a certain amount of revolver ammunition which had theretofore been shipped and transported in interstate commerce (Transcript of Record, pp. 2 and 3); the third count charged the defendant with receiving, after having been convicted of a crime of violence, a revolver which had theretofore been shipped and transported in interstate commerce (Transcript of Record, p. 3); the fourth count charged the defendant with transporting, after having been convicted of a crime of violence, a revolver which had theretofore been transported and shipped in interstate commerce (Transcript of Record, p. 4).

The defendant filed a demurrer to the indictment (Transcript of Record, p. 5) which was overruled (Journal Entry of December 22, 1941, Transcript of Record, p. 6) and the case went to trial by a jury.

The evidence offered by the United States tended to show that the defendant had been convicted in 1922 in an Insular Court of Puerto Rico of the crime of aggravated assault and battery (Amended Bill of Exceptions, Transcript of Record, pp. 20 and 21). It also tended to show that on the date mentioned in the indictment the defendant had in his possession and transported a .38 caliber revolver, and that two or three days before, on the date mentioned in the indictment he made another person buy a certain number of bullets for him and carried said bullets from the state to the defendant's house (Amended Bill of Exceptions, Transcript of Record, pp. 21 to 24).

Defendant's evidence tended to rebut the Government's evidence as to the possession of the revolver on the date specified in the indictment (Amended Bill of Exceptions, Transcript of Record, pp. 24 to 30.)

After deliberation, the jury found the defendant guilty in all four counts (Verdict, Transcript of Record, p. 6) and the Court sentenced the defendant to imprisonment in the penitentiary for a period of 3 years on the first count, 3 years on the second count, 5 years on the third count and 5 years on the fourth count, the first two sentences to be consecutive, the last two concurrent but consecutive to the first two and the last two to be suspended (Judgment and Commitment, Transcript of Record pp. 7 and 8). From the said judgment defendant appealed to the Circuit Court of Appeals for the First Circuit, assigning, among others, the following errors:

1. The court erred in overruling defendant's demurrer to the indictment.

2. The verdict was contrary to the law and facts (Assignment of Errors, Transcript of Record, pp. 11-14).

The case was heard by the Circuit Court of Appeals and judgment giving affirming the verdict and judgment of the District Court (Judgment of the Circuit Court, Transcript of Record, p. 52). It is this judgment which the petitioner wishes reviewed.

IV

Assignment of Errors.

1. The Circuit Court of Appeals erred in holding that the Federal Firearms Act is valid and constitutional.

2. The Circuit Court of Appeals erred in holding that the indictment alleged sufficient facts to show the commission of a crime.

3. The Circuit Court of Appeals erred in holding that there was sufficient evidence to support the verdict on the first two counts.

V

Summary of Argument.

The Federal Firearms Act is unconstitutional and invalid because: (a) it is ex post facto; (b) it limits the right of the people to keep and bear arms; (c) it is an undue extension of the interstate commerce clause of the Constitution; (d) it creates an unreasonable presumption, and (e) it is unequal in its application since it does not apply equally to all persons of the same class.

The indictment in the District Court (Transcript of Record, pp. 1-4) alleged as a prior conviction of the petitioner herein, a conviction of aggravated assault and battery under Puerto Rican law, which is not one of the "crimes of violence" listed by the Federal Firearms Act, sec. 901 (6). Also, in the second and fourth counts it failed to allege transportation in interstate commerce (Transcript of Record, pp. 2, 3 and 4).

The evidence failed to show that the ammunition was of the kind prohibited by law and as to the first and second counts it showed that the reception and the transportation alleged in the separate counts constituted one single act.

VI

ARGUMENT.

First Assignment of Error.

The Circuit Court of Appeals erred in holding that the Federal Firearms Act is valid and constitutional.

The defendant in this case was indicted for a violation of the Federal Firearms Act, Sec. 2 (f) and 2 (e), C. 850, § 2

(e) and (f), 52 Stat. 1252, 15 U. S. C. A., 902 (f) & (e) (Indictment, Transcript of Record, pp. 1-4). It is respectfully submitted that the law on which the indictment is based is invalid and unconstitutional.

The statute, in its pertinent parts, says:

> "(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.
>
> "(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."
>
> Federal Firearms Act, § 2 (e) & (f), C. 850, 52 Stat. 1252, 15 U. S. C. A., sec. 902 (f) & (e).

From the sections above quoted it is clear, in our opinion, that no matter what the intention of the law may be, in its effects it is ex post facto. Before this law was approved, the citizens of the United States, as far as the Federal Government was concerned, had the right to keep and bear arms. The effect of the Federal Firearms Act is to take this right away from a certain class of citizens and the only basis for the classification is the fact that he has been previously convicted of a crime of violence. In other words, he has a right taken away from him because of a crime committed before the law was passed. In the case now before the consideration of this Court, the petitioner herein was convicted and punished for a crime in 1922 (Government's Exhibit No. 1, Amended Bill of Exceptions, Transcript of Record, pp. 20

& 21). In 1938, sixteen years later, the Government takes away from him a right common to all citizens of the United States because of this crime for which he has already been punished. That such a deprivation constitutes a punishment for past offenses has already been decided by the United States Supreme Court.

The case of Cummings v. Missouri is quite in point. The State of Missouri adopted a clause in its constitution which stated, among other things, that no priest or minister could exercise his calling without taking an oath that he had never conspired against the Federal Government. The law was declared unconstitutional as imposing additional punishment for a crime committed before the adoption of the law, the court saying among other things:

> "The Constitution deals with substance not shadows. Its inhibition was leveled at the thing not the name. It intended that the rights of the citizen should be secured against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of enactment, its insertion in the fundamental law was a vain and futile proceeding."
>
> *Cummings* v. *Missouri*, 4 Wall. 277, 329, 18 L. Ed. 356, 365 (1867).

The case of *Ex Parte Garland*, 4 Wall. 377, 18 L. Ed. 370 (1867), is almost identical except that it deals with a Federal law which required for admission to practice before the Supreme Court of the United States an oath similar to the one in the case of *Cummings* v. *Missouri*, supra. This law was also held unconstitutional.

In *Pierce* v. *Carskadon*, 16 Wall. 234, 21 L. Ed. 276 (1873), a law passed in West Virginia requiring an oath similar to that of the Cummings case as a prerequisite to the right to ask for the reconsideration of a judgment. This law was also held to be ex post facto.

Let us see how the case now before the consideration of this court fits within the doctrine enunciated in the above cases. Before the Federal Firearms Act was approved all citizens of the United States had, as far as the Federal Government was concerned, the right to receive or transport in interstate commerce revolvers or ammunition. The Federal Firearms Act takes this right away from some citizens. Which citizens? Those who have been previously convicted of a crime of violence, are under indictment or are fugitives from justice. Aren't these facts the same as those in the cases cited? Isn't the defendant in this case punished by the deprivation of a right for a crime committed before the law went into effect just as much as in those cases, or more?

The Circuit Court of Appeals in its opinion, argues that the cases of *Cummings* v. *Missouri, Ex Parte Garland* and *Pierce* v. *Carskadon,* supra, may be distinguished from the present in that the requirements in those cases the past conduct was not a reasonable test of the fitness of the person to engage in certain work while in the present case it is. (Opinion of the Circuit Court, pars. 8-9). If this were so, it seems to us that, at least in the case of *Ex Parte Garland,* supra, past seditious conduct should certainly be considered as a proper test for practice of a profession which, among other things, requires an oath to uphold the Constitution of the United States. On the other hand, an assault with intent to commit a crime, in which the violence used may be only technical and which may have been committed, as in the present case, more than 16 years before the passage of the law (Transcript of Record, pp. 1-4) does not mean that that person is forever unfit to carry or receive any kind of firearm. It is all the more unreasonable if the term crime of violence is to receive the interpretation given to it by the Circuit Court (Opinion of the Circuit Court, pars. 21 & 22); it becomes all the more unreasonable since, under that interpretation, in Puerto Rico, for instance, a

light blow with the open hand, but struck in a private dwelling, would be an aggravated assault and battery punishable by more than one year's imprisonment and would make the person guilty of a crime of violence. (§ 6 (3) of Law of Puerto Rico, approved March 10, 1904. See Appendix A).

The statute in question is also unconstitutional because it infringes the right of the people to keep and bear arms. It has been held that the constitutional provision against curtailing the right of the people to keep and bear arms must be considered together with its end which is the preservation of a well regulated militia. On these grounds the limitating of the use of certain weapons has been upheld as valid.

> "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary militia equipment or that its use could contribute to the common defense."
>
> *United States* v. *Miller*, 307 U. S. 174, 178, 83 L. Ed. 1206, 1209 (1939).

Admitting the validity of this argument, the conclusion must be reached that the Federal Firearms Act goes too far. Let us see its definition of a firearm.

> "The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon."
>
> *Federal Firearms Act*, § 1 (3), C. 850, 52 Stat. 1252, 15 U. S. C. A. sec. 901 (3).

The definition is comprehensive enough to cover any weapon from a .22 caliber target pistol to the largest coast-defense gun made. It is true that ammunition is defined as referring to pistol and revolver ammunition only.

> "The term 'ammunition' shall include only pistol or revolver ammunition. It shall not include shot-gun, metallic ammunition suitable for use only in rifles, or any .22 caliber rimfire ammunition."
>
> *Federal Firearms Act*, § 1 (8), c.850, 52 Stat. 1252, 15 U. S. C. A. sec. 901 (8).

but pistols and revolvers are necessary to a well-organized militia and, anyway, of what use is ammunition without a weapon?

An effort was made to avoid this problem by creating a class of excepted persons.

> "The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition, sold or shipped to, or issued for the use of, (1) the United States or any department, independent establishment, or agency thereof; (2) any State, Territory, or possession, or the District of Columbia, or any department, independent establishment, agency, or any political subdivision, thereof; (3) any duly commissioned officer or agent of the United States, a State, Territory, or possession, or the District of Columbia, or any political subdivision thereof; (4) or to any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money and valuables; (5) or to any research laboratory designated by the Secretary of the Treasury: Provided, That such bank, public carriers, express, and armored truck companies are granted exemption by the Secretary of the Treasury; nor to the transportation, shipment, or receipt of any antique or unserviceable firearms, or ammunition, possessed and held as curios or museum pieces; Provided, That nothing herein con-

tained shall be construed to prevent shipments of firearms and ammunition to institutions, organizations, or persons to whom such firearms and ammunition may be lawfully delivered by the Secretary of War, nor to prevent the transportation of such firearms and ammunition so delivered by their lawful possessors while they are engaged in military training or in competitions."

Federal Firearms Act, § 4, c.850, 52 Stat. 1252 15 U. S. C. A., sec. 904.

These exceptions, however, do not avoid the objections to the law since they refer mostly to persons connected in some way with the Government. The Second Amendment to the Constitution does not say that the right of the "militia" to keep and bear arms shall not be infringed. It prohibits the infringement of the right of the *people* to keep and bear arms. Therefore, people have a right to keep and bear arms, in their private capacity, which cannot be infringed so long as the arms are of the kind appropriate for a militia. This conclusion is logical. The militia is made up of private citizens and said citizens must be well trained in the use of weapons if the country is expected to have a well trained militia.

The Circuit Court of Appeals in its opinion admits that the Federal Firearms Act does limit to some extent the right to keep and bear arms (Opinion of the Circuit Court, par. 10) but states that this right may be curtailed within limits (Opinion of the Circuit Court, par. 12), citing the case of *United States* v. *Miller*, supra, but then refuses to follow this decision to its logical conclusion (Opinion of the Circuit Court, par. 13) and hold that the Federal Firearms Act is invalid when applied to revolvers. The court argues that modern developments have made military use of most any kind of lethal weapon and that this would carry the rule of the Miller case to absurd conclusions. In the first place, if the rule of the Miller case is fundamentally cor-

rect, the fact that under certain circumstances it might be carried to absurd lengths does not make it wrong, at least, not until this court says so. In the second place, according to the Miller case, the right to keep weapons which cannot be infringed is the right to keep weapons customarily and generally used by militia and that does not necessarily include any weapon which might be put to military use. Militia were originally, and still are in many places, a voluntary group of non-professional soldiers who do not dedicate their fulltime to this in peace times and who often arm and dress themselves. For this reason, they have to have their weapons handy. And it cannot be denied that the commonest arms of militia are rifles, pistols or revolvers, swords and bayonets, since these are the fundamental weapons of any army.

The Circuit Court further alleges against the petitioner's contention, that there was no evidence that the petitioner herein was a member of a military organization or that he was using the weapon in preparation for a military career. (Opinion of the Circuit Court, par. 14). The incorrect use of a weapon suitable for militia by a person in no way curtails his right to keep and bear arms, except insofar as it may land him in the penitentiary. Neither does the fact that a person doesn't belong to a military organization. Even if it did, since the weapon in the present case was one of the natural weapons of militia, it would be up to the government to prove that the accused was not a military man. The situation in the case of United States v. Miller, supra, was different. There the weapon involved was one not usually associated with militia so it would have been up to the accused to show that in that particular case it was a militia weapon.

Besides being *ex post facto* and infringing the right of the people to keep and bear arms, this statute is also an undue extension of the commerce clause of the constitution, at least in some respects.

The second paragraph of the first section of the Federal Firearms Act gives the usual definition for interstate or foreign commerce. However, the last clause of that paragraph goes farther:

> "* * * or within any Territory or possession or the District of Columbia."
> 15 U. S. C. A., sec. 901 (2).

By this clause, Congress attempts to make commerce within a possession, interstate commerce. Interstate commerce means commerce between two different jurisdictions whether those two jurisdictions are States, Territories or possessions. But there cannot be commerce between two jurisdictions when the acts are all done within one of the jurisdictions. The Constitution gives Congress the right to regulate interstate commerce, but it does not give it the right to say what interstate commerce is. Therefore, the mere fact that Congress says that commerce within a territory or possession is interstate commerce, does not make it such.

> "Congress may not arbitrarily classify an act as something, the attributes of which it does not partake. Heiner *v.* Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772, but it may always designate an act as coming within a certain category if in its inherent nature it may reasonably be said to be endowed with the qualities of such category."
> *In re Chicago, R. I. & P. Ry. Co.*, 90 F. (2d) 312, 316 (1937).

There can't be any doubt that Puerto Rico is a separate jurisdiction from that of any State, Territory or Federal jurisdiction.

> "We have recently said that 'The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination with an autonomy

similar to that of the states and incorporated territories."

Barcardi Corp. v. *Domenech,* 311 U. S. 150, 167, 85 L. Ed. 98, 108 (1940).

Being a separate jurisdiction, commerce within Puerto Rico cannot be classed as interstate commerce by any stretch of the imagination. Whether Congress could prohibit the keeping or bearing of weapons by a certain class of people in Puerto Rico or by all classes, is not now in issue. A government may have the right to do a certain thing in a certain way but this does not mean that it has the right to use any means whatever to accomplish the object.

Section 2 (f) of the Federal Firearms Act, c. 850, 52 Stat. 1252 (15 U. S. C. A., 902 (f)), is more objectionable yet. This Section prohibits the reception of firearms or ammunition which have been shipped or transported in interstate or foreign commerce. If the Section is given the interpretation that was given to it by the District Court, we have the situation of the Federal Government prohibiting the reception of an article because of the mere fact that it was once in interstate commerce, irrespective of whether it has lost or not its interstate character. That this cannot be done, has already been decided.

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughter-house markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become co-mingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not

held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."

Schechter v. *United States,* 295 U. S. 495, 543, 79 L. Ed. 1570, 1587 (1935).

The Federal Firearms Act is also invalid, at least in part, because of the presumption of guilt which it creates in Section 2 (f), C. 850, 52 Stat. 1252, 15 U. S. C. A. 902 (f). The question of presumption is one which must be studied according to the particular facts in each case. The basic factor, however, that would be taken into consideration, is whether the presumption is reasonable or not.

"What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience."

Morrison v. *California,* 291 U. S. 82, 90, 78 L. Ed., 664, 670 (1934).

"By force of the statute, possession of narcotics gives rise to an inference that the person in possession had knowledge of such unlawful importation. The inferences are reasonable enough to save the statutory provision from the charge of unconstitutionality."

United States v. *Moe Liss,* 105 F. (2d) 144, 146 (1939).

"The Court takes judicial notice that opium is not commercially a domestic product. Perverted to evil uses, it is in general an outlaw. Its presence in this country, apart from statutes, is practically a conclusive presumption of importation. Presence and possession in the accused invoke the statutory presump-

tion that he imported it or received it after importation. And since its importation is unlawful these six years, in view of its nature the statutory presumption that it was imported within said period and to the knowledge of any receiving it is not unreasonable to the extent hereinbefore indicated."

United States v. *Yee Fing*, 222 Fed. 154, 156 (1915).

Is the presumption created by law in this case a reasonable one? We respectfully submit that it is not. Firearms and ammunition are things which may be manufactured anywhere. They are not like opium, something which must be imported. Also, since Congress cannot legislate over articles that have already lost their interstate character, even if the firearms had originally been in interstate commerce they might have been acquired after they had lost their interstate character. Furthermore, the main reason for creating presumption of guilt is that the facts are very hard to prove by the government while the innocence of the accused, if he is innocent, can be easily proved by him. This argument does not hold true in the present case. If a person buys a firearm from another party he may be in no better position than the Government to prove whether that firearm has or has not an interstate character. This is all the more so in the case of ammunition since ammunition is very often refilled after being used. It is completely unjust and a deprivation of the presumption of innocence to force a person, just because he has a firearm or ammunition in his possession, to trace back to its origin this article. If anybody could do it, the Government probably could do it much easier than the accused.

In the case of *Manley* v. *Georgia*, 279 U. S. 1, 73 L. Ed. 575 (1929) it was held that a statute which created a presumption of fraud on the part of the directors from the insolvency of a bank was a denial of due process. This present case is much stronger than the case of *Manley* v.

Georgia, supra. If the records of a bank are properly kept, it would be very easy for the directors to prove their innocence. Not only that, but insolvency of banks is very often caused by fraud on the part of the directors while a private person usually buys firearms locally and not in interstate commerce. What is more, most manufacturers of firearms will not sell directly to the consumer, but only to retailers.

The case of Kennedy vs. U. S. was not a case of a presumption created by law but it is illustrative since the same principles applied. In that case, to prove the smuggling of whiskey from Canada, the government depended on the labels of the bottles to show the origin of the whiskey. The Court said:

> "* * * and we think it is well settled that such labels, when found on containers of intoxicating liquors, have little or no tendency to prove the kind or quality of the liquor, or the place of manufacture, in absence of evidence tending to prove that the labels are genuine."
>
> *Kennedy* v. *United States,* 44 F. (2d) 131, 134 (C. C. A. 9th, 1930).

Finally, there is the case of McFarland vs. American Ref., 241 & S. 79, 60 L. Ed. 898 (1916). The law of Louisiana stated that whenever a sugar refinery paid a lower price for local sugar than the price paid in other states, or whenever it closed up its factory for more than a year, it would be presumed that it was done for the purpose of infringing the law against trusts. This presumption was also held to be unreasonable.

There is another objection to be made to the Federal Firearms Act and it is that, if interpreted as it was by the Circuit Court, it is discriminatory in that it does not apply to all persons in the same situation. The law states that it is applicable to persons who have been convicted of a

crime of violence but in connection with the facts now under consideration, it does not specify under what law the previous conviction must have been found. If the previous conviction can be one under the law of any state, possession, territory or foreign country, then the law would not necessarily apply to both of two citizens who have been convicted of the same crime since the term of imprisonment for the crime might be less than a year in one case and more than a year in another. Not only that, but a citizen of one state might have been convicted in that state for a certain crime at a time when the punishment was fixed at more than a year and he would come under the jurisdiction of the Federal Firearms Act. But another citizen of the same state, convicted of the same crime after the law had been amended to impose a lesser punishment, would not be subject to the prohibition of the Federal Firearms Act in spite of the fact that the previous crimes of both citizens were of exactly the same nature.

Second Assignment of Error.

The Circuit Court of Appeals erred in holding that the indictment alleged sufficient facts to show the commission of a crime.

The demurrer to the indictment (Transcript of Record, p. 5) should also have been sustained because the same did not allege, at least as to some counts, sufficient facts to show the commission of a crime. The indictment alleged that the previous conviction of the defendant had been one for aggravated assault and battery under the Puerto Rican law. (Indictment, Transcript of Record, pp. 2-4). Even admitting the validity of considering a conviction under a local law as a previous conviction, it would still be found that the crime of which the defendant had been previously convicted, is not a crime of violence under the meaning of the Federal

Firearms Act. The definition of a crime of violence under the Federal Firearms Act is as follows:

> "The term 'crime of violence' means murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year."
>
> *Federal Firearms Act*, c. 850, 52 Stat. 1252, 15 U. S. C. A., sec. 901, (6).

The indictment in this case certainly does not allege that the defendant had been convicted of any of the first seven crimes mentioned in the above section. It does not allege either, any of the specific kinds of assault mentioned in said section. The only allegation is that the defendant was convicted of aggravated assault and battery. Section six of the law of Puerto Rico creating and defining the crime of aggravated assault and battery (see Appendix "A") gives ten different circumstances which will constitute an aggravation of a crime of assault and battery. Of these, only one, subsection eight, assault with a dangerous weapon, would come under the definition of a crime of violence as defined by the Federal Firearms Act. The indictment in this case, however, does not specify that defendant was convicted of assault with a dangerous weapon. As a matter of fact, the crime of assault with a dangerous weapon does not exist in Puerto Rico, the use of the dangerous weapon being only one of the forms in which aggravated assault and battery can be committed. (See appendix "A".) What is more, two or more of the circumstances which constitute aggravated assault and battery might concur and still there would be only one crime committed—Aggravated Assault and Battery.

It is true that aggravated assault and battery may be punishable by imprisonment for more than one year, but

Section, subsection 6, of the Federal Firearms Act, does not make a crime of violence any crime punishable by imprisonment for more than one year. The crime which is a crime of violence is the crime of committing an assault with intent to commit a crime punishable by more than one year's imprisonment. This particular crime is not known in Puerto Rico. (Penal Code of Puerto Rico, 1937 Edition.) The reason for including it among the crimes of violence in the Federal Firearms Act is quite obvious and makes it inapplicable to the case now before the consideration of this Court. Under the Federal Law, any crime punishable by more than one year's imprisonment is a felony and the intention of Congress must have been to include among the crimes of violence the assault with intent to commit a felony.

In Puerto Rico, assault with intent to commit a felony is a crime separate and distinct from that of aggravated assault and battery, Penal Code of Puerto Rico, Section 223, 1937 Ed.) and it is a felony. Aggravated assault and battery is a misdemeanor in spite of the fact that it may be punishable by more than one year's imprisonment. (Section 8, Appendix "A".) This because of the fact that the difference between felonies and misdemeanors in Puerto Rico is based on whether the imprisonment is in a jail or in a prison.

> "A felony is a crime which is punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary is also punishable by fine or imprisonment in jail, for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary." (Sic.)
>
> *Penal Code of Puerto Rico,* sec. 14, (1937 Ed.).

In holding that aggravated assault and battery constitutes a crime of violence under the Federal Firearms Act,

the Circuit Court states such a conviction in Puerto Rico is a conviction for an assault with intent to commit an aggravated battery and also a conviction for aggravated assault and battery (Opinion of the Circuit Court, par. 22). This position we believe to be clearly untenable.

Section 1 of the Law of March 10, 1904, (See Appendix "A") states:

> "The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself an immediate intention, coupled with an ability to commit a battery, is an assault."

From the above, we believe it is obvious that if there is a battery, there can be no assault as a separate crime. Since an assault is an attempt to commit a battery, once there is a battery, there is no longer an attempt but an actual commission The Circuit Court's theory would amount to double jeopardy since the accused would be tried and punished, at the same time, twice for the act—first for the assault, and again for the same assault as part of the assault and battery. Even if he could be, he was not in this case. He was convicted and sentenced for assault and battery, not for assault and assault and battery. And it must be remembered that Section 2 of the Federal Firearms Act, c. 850, 52 Stat. 1252, requires a conviction. Having been indicted is not enough, except where the federal crime is committed while under indictment. Also, that the crime of battery does not exist in Puerto Rico. It is assault and battery. (Law of March 10, 1904, sec. 1, Appendix "A").

If the Federal Firearms Act is interpreted as not meaning to extend to weapons that have already lost their interstate character, which is the only interpretation consistent with its validity, then the first and third counts of the indictment

do not allege sufficient facts to constitute a crime under Section 2 (f) (Transcript of Record, pp. 1 & 3) since they allege merely that the defendant received a revolver and ammunition which had theretofore been transported in interstate commerce, but there is no allegation that he was on the receiving end of an interstate transportation. It is true that the third count states that the defendant had the revolver in his possession, but apart from the invalidity of the presumption so created, it is not sufficient allegation since it is only a rule of evidence. The fact that must be pleaded is that the defendant received a revolver in interstate commerce, although this issue may be proved, if the presumption is taken as valid, by proof of possession.

Third Assignment of Error.

The Circuit Court of Appeals erred in holding that there was sufficient evidence to support the verdict on the first two counts.

As to the transportation or reception in interstate commerce, the evidence presented by the Government showed, at the most, and taking it in its most favorable light, possession and transportation in Puerto Rico but not in interstate commerce (Amended Bill of Exceptions, Transcript of Record, pp. 21-30). In other words, the Government depended exclusively on the presumption created by law, and the invalidity of this presumption has already been demonstrated. It also depended on the invalid definition of interstate commerce. This is not all. The Second and Fourth Counts of the indictment are based on the Second Section, subsection (e) of the Federal Firearms Act. The presumption from possession on which the Government depended appears in, and it applies to, subsection (f) only. There is no presumption appended to the crime of shipping or transporting, or causing to be transported. This is quite logical. Presumptions are usually created because of difficulty of

proof but while it might be difficult to prove reception in interstate commerce, this difficulty does not arise in proving shipping or transporting in interstate commerce.

The preceding points are not the only points on which the evidence failed to sustain the indictment. The First Count of the indictment charged the defendant with receiving "a certain amount of revolver ammunition, to wit, approximately ten bullets", (Indictment, Transcript of Record, p. 2) and the Second Count charged him with transporting "a certain amount of revolver ammunition, to wit, approximately ten bullets" (Indictment, Transcript of Record, p. 2). The only evidence presented to support these two counts was the testimony of José Mojica Martinez who testified as follows:

> "Prior to that night, on August 27th, defendant asked the witness to purchase ten bullets for him. Witness bought them at the Europa hardware store and gave them to defendant who kept them in his hand, shifting them from one hand to the other. From the hardware store they went to defendant's house and from there to Guillermo Carreras' house."
>
> *Amended Bill of Exceptions, Transcript of Record,* p. 23.

The bullets were not introduced in evidence, they were not described in any way and there was no further evidence as to them.

The Federal Firearms Act prohibits the transportation or reception of ammunition and ammunition is defined as including only pistol or revolver ammunition, not including a rifle, shotgun or .22 caliber rimfire ammunition (15 U. S. C. A. sec. 901 (8). To prove the commission of a crime the Government would have had to prove the reception or transportation of revolver or pistol ammunition. In the present case we have no way of knowing if the bullets were for a pistol or revolver or not. For that much, we don't even

know if when the witness referred to "bullets" he was referring to the complete ammunition, that is, ball and cartridge, or referring only to the ball or bullet since the terms are used interchangeably and one refers to "being struck by a bullet" meaning the ball without the cartridge case.

The Circuit Court in its opinion states that when the friend of the petitioner herein went to buy the ammunition at the Europa hardware store, he asked for ten rounds of ammunition for the petitioner, giving to the storekeeper the petitioner's nickname; that the petitioner was well known in the store and that it was commonly known that he customarily carried a .38 caliber revolver (Opinion of the Circuit Court, par. 24). A careful examination of all the evidence (Transcript of Record, pp. 15-36) has failed to show any evidence on which the Circuit Court of Appeals could base its conclusions that petitioner's friend had told the storekeeper for whom he wanted the bullets or had referred to petitioner by petitioner's nickname; or that petitioner was well known in the store; or that it was commonly known (except, perhaps, among his friends) that petitioner customarily carried a .38 caliber revolver.

These foregoing conclusions, for which we have been able to find no basis in the evidence, are used by the Circuit Court of Appeals as an argument that there was sufficient proof of the caliber and kind of ammunition bought. Even if the evidence did warrant these conclusions, we still fail to see in what way they could be helpful to the government's case, at least, in the absence of proof that petitioner owned only one firearm. The Circuit Court in the same paragraph of its opinion, just cited, seems to indicate that it was up to the petitioner to prove that he had other firearms. It is respectfully submitted that if the government wanted to prove its case by circumstantial evidence, then it was up to the government to bring forth sufficient evidence to

eliminate any reasonable hypothesis of the petitioner's innocence. It should also be noted that none of the government's witnesses who testified as to the ownership and possession of the revolver, testified whether it was loaded or unloaded at the times they saw it.

Furthermore, the evidence as to the transportation and reception of the ammunition shows that if there was a crime committed it was one and not two. The only transportation shown was a part and the fulfillment of the reception (Amended Bill of Exceptions, Transcript of Record, p. 23). The same act may constitute an infringement of two different statutes but the same statute cannot be infringed in two different ways by only one act.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals herein.

San Juan, Puerto Rico, December 25, 1942.

HUGH R. FRANCIS,
EDGAR S. BELAVAL,
Attorneys for Petitioner.

APPENDIX A.

Law Approved March 10, 1904.

AN ACT

To Define and Punish Simple Assault, Simple Assault and Battery, Aggravated Assault and Aggravated Assault and Battery, and to Repeal Section 237 of the Penal Code.

Be it enacted by the Legislative Assembly of Porto Rico:

SECTION 1. The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself an immediate intention, coupled with an ability to commit a battery, is an assault.

SECTION 2. Violence used to the person does not amount to an assault or an assault and battery in the following cases:

1. In the exercise of the right of moderate restraint or correction given by law to the parents over the child, the guardian over the ward, the master over his apprentice, whenever the former be authorized by the father or guardian of the latter so to do;

2. For the preservation of order in a meeting for religious or other lawful purposes, in case of obstinate resistance to the person charged with the preservation of order;

3. The preservation of peace, or to prevent commission of offenses;

4. In preventing or interrupting an intrusion upon the lawful possession of property against the will of the owner or person in charge thereof;

5. In making a lawful arrest and detaining the party arrested, in obedience to the lawful orders of a magistrate or court, and in overcoming resistance to such lawful order;

6. In self-defense or in defense of another against unlawful violence offered to his person or property.

SECTION 3. In all cases mentioned in the preceding section, when violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose.

SECTION 4. No verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense.

SECTION 5. The punishment for a simple assault, or for assault and battery unattended with circumstances of aggravation, shall be a fine of not less than one nor more than fifty dollars.

SECTION 6. An assault and battery becomes aggravated when committed under any of the following circumstances:

1. When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty.

2. When committed in a court of justice, or in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement;

3. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery;

4. When committed by a person of robust health or strength upon one who is aged and decrepit;

5. When committed by an adult male upon the person of a female or child, by an adult female upon the person of a child.

6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip, cowhide or cane;

7. When a serious bodily injury is inflicted upon the person assaulted;

8. When committed with deadly weapons under circumstances not amounting to an intent to kill or maim;

9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury;

10. When committed by any person or persons in disguise.

SECTION 7. The circumstances of aggravation mentioned in the preceding section are of different degrees, and the court is to consider these circumstances in forming the judgment and for assessing the punishment.

SECTION 8. The punishment for an aggravated assault, or aggravated assault and battery, shall be a fine of not less than fifty nor more than one thousand dollars, or imprisonment in jail not less than one month nor more than two years, or by both such fine and imprisonment.

SECTION 9. Section 237 of the Penal Code is hereby repealed.

SECTION 10. All laws, orders and decrees, or parts thereof, in conflict with this Act, are hereby repealed.

SECTION 11. This Act shall take effect from and after its passage.

(4552)

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 713

JOSE CASES VELAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 40–52) is reported, 131 F. (2d) 916.

JURISDICTION

The judgment of the circuit court of appeals was entered November 27, 1942 (R. 53). The petition for a writ of certiorari was filed December 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crim-

inal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the application of the prior conviction clause of the Federal Firearms Act of 1938 to a person whose conviction took place prior to the effective date of the Act is ex post facto.

2. Whether the Act invalidly abridges the right to bear arms.

3. Whether section 1 (2) of the Act is arbitrary in defining as "interstate or foreign commerce" transactions wholly within a single Territory.

4. Whether section 2 (f) is beyond the power of Congress over commerce, or unreasonable under the due process clause.

5. Whether the definition of "crime of violence" in section 1 (6) is discriminatory.

6. Whether petitioner's prior conviction was for a "crime of violence" as defined in section 1 (6).

7. Whether the first and third counts of the indictment sufficiently allege the receipt of a firearm and ammunition in interstate commerce contrary to section 2 (f).

8. Whether the second and fourth counts of the indictment sufficiently allege the transportation of a firearm and ammunition in interstate commerce contrary to section 2 (e).

9. Whether there was sufficient evidence that the bullets possessed by petitioner were "ammunition" as defined in section 1 (8).

10. Whether the same evidence was available in support of two counts, one for receipt of ammunition under section 2 (f) and the other for transportation under section 2 (e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved herein are set forth in the Appendix, *infra,* pp. 20–21.

STATEMENT

Petitioner was convicted in the District Court of the United States for the District of Puerto Rico, on all counts of a four-count indictment under the Federal Firearms Act of 1938. The first count alleged receipt of ammunition contrary to section 2 (f) of the Act; the second alleged transportation of the same ammunition contrary to section 2 (e); both counts alleged the crimes to have occurred on August 27, 1941. The third count alleged receipt of a firearm contrary to section 2 (f); and the fourth alleged transportation of the same firearm contrary to section 2 (e); both the latter counts alleged the crime to have occurred on August 30, 1941, three days after the date mentioned in the first two counts. (R. 1–4.) Petitioner was sentenced to a three-year term on each of the first two counts, to run consecutively, and was placed upon five years' probation on each of the last two counts, to run concurrently after the

expiration of the sentences on the first two counts (R. 7–8).

The principal evidence was as follows: Petitioner had, on February 13, 1922, been convicted of "aggravated assault and battery" in a Puerto Rico territorial court, and sentenced to one year in jail (R. 20–21). On August 27, 1941, at petitioner's request, a friend purchased at a local hardware store ten bullets (type and calibre unspecified), and turned them over to petitioner. On August 30, 1941, he was in possession of a loaded gun, a .38 calibre Colt Style Revolver made in Spain (R. 21, 22, 23, 37), and transported it about with him to various places in Puerto Rico (R. 22–23). Details of the proof will be stated later, as they become relevant, in the Argument.

Petitioner appealed the conviction to the Circuit Court of Appeals for the First Circuit, making among others the same contentions he now makes here, and the conviction was affirmed (R. 52–53).

ARGUMENT

I

The effective date of the statute (Section 6, 15 U. S. C. 906) was July 30, 1938. The crimes of receiving and transporting were alleged and proved as of August 1941, substantially subsequent to the statute, but the conviction of a crime of violence, which is an essential condition of the

application of the statute, was alleged and proved to have occurred in February 1922, a time substantially prior to the enactment of the statute (R. 20–21). On these facts petitioner asserts (Pet. 5, Br. 13–17) that the court below erroneously rejected his contention that the statute is *ex post facto* as to him, because the statute constitutes an additional punishment for past offenses. The situation herein is even further from being additional punishment for past crimes than is the situation presented by the statutes imposing heavier penalties for a particular crime on recidivists than on first-time offenders. Yet such statutes are not *ex post facto*. *Graham* v. *West Virginia,* 224 U. S. 616; *McDonald* v. *Massachusetts,* 180 U. S. 311; *Beland* v. *United States,* 128 F. (2d) 795 (C. C. A. 5), No. 416 this term, certiorari denied November 9, 1942, rehearing denied November 23, 1942.

Petitioner's second fallacy is in overlooking *Hawker* v. *New York,* 170 U. S. 189, and *Dent* v. *West Virginia,* 129 U. S. 114, 128, which explain and limit the earlier cases relied on by petitioner, *Cummings* v. *Missouri,* 4 Wall. 277; *Ex-parte Garland,* 4 Wall. 333; and *Pierce* v. *Carskadon,* 16 Wall. 234. As the court below pointed out (R. 43, 44), the *Hawker* and *Dent* cases make clear that a legislature need not ignore past dangerous conduct in weighing the necessity for prohibiting future conduct.

II

Both the court below and the Circuit Court of Appeals for the Third Circuit in *United States* v. *Tot* 131 F. (2d) 261, have answered at length the contention (Pet. 8, Br. 17–20) that the statute constitutes an infringement on the right to bear arms guaranteed by the Second Amendment. We feel it unwarranted to do more in this connection than refer to the opinion below (R. 45–47), to that of the Third Circuit in the *Tot* case, 131 F. (2d) 261, and to our brief in the *Tot* case opposing certiorari on this point. Certiorari was not granted on this point in the *Tot* case (R. 93, No. 569) and we submit that it should not be granted herein.

III

Petitioner's next contention (Pet. 8, Br. 20–22) appears to be that the language of Section 2 (e) does not permit its application to transportation wholly, so far as the record shows, within a single territory. He urges that that subsection applies only to transportation "in interstate or foreign commerce", and that Section 1 (2), defining the quoted phrase to include transportation "within any Territory," is an arbitrary classification.

The effect of the definition is to make the substantive provision prohibit transportation of a weapon by an ex-convict "in interstate or foreign

commerce or within a Territory." It is settled that the fact that a statutory definition is arbitrary in terms of common usage is no bar to its legislative employment. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 95–96; *Von Weise* v. *Commissioner of Internal Revenue*, 69 F. (2d) 439, 441 (C. C. A. 8), certiorari denied, 292 U. S. 655. Since petitioner appears to concede what is in any event obvious, that Congress would have had the power to legislate directly with respect to transportation within the territory, there can be no sound complaint against its manner of expressing itself. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443.

IV

Petitioner next turns to section 2 (f), under which Counts I and III of the indictment were drawn, and asserts (Pet. 8, Br. 22–25) that it is beyond the commerce power because it asserts regulation of reception of an article without regard to whether the article is still in commerce and asserts that the presumption of interstate commerce is unreasonable.

As we have just demonstrated under Part III hereof, the requirement of "interstate or foreign commerce" is validly defined to include any commerce within Puerto Rico. Accordingly, the

presumption on this score is simply a presumption that the gun and ammunition were acquired either in Puerto Rico or as the termination of a transit into Puerto Rico,[1] and the probability of this presumption is so high that there can be no serious question of its validity as a matter of due process.[2] *Mobile, Jackson & Kansas City R. Co.* v. *Turnipseed,* 219 U. S. 35, 42; *Casey* v. *United States,* 276 U. S. 413, 418. Consequently the question is not present here which justified review in *United States* v. *Delia,* No. 636, and *Tot* v. *United States,* No. 569, although the court below did not make such a distinction (R. 49).[3]

[1] The charge to the jury did not proceed on this construction but instead assumed the usual definition of interstate commerce (R. 31). However, any error on that score is immaterial because the charge on this point was gratuitous: the evidence showed possession and no evidence tended to rebut the presumption on either construction. Moreover, petitioner did not except to this portion of the charge or request any substitute. He is therefore in no position to complain of the charge on review.

[2] The only other possible manner of acquisition is that petitioner himself brought it into Puerto Rico, in violation of section 2 (e). Petitioner does not raise the question of time of acquisition discussed in our brief in the *Delia* case, No. 636, pp. 38–42, and the record does not permit him to raise that question because it is silent as to the age of the gun and the date of his acquisition of it.

[3] Our statement in the Delia petition (p. 5) and the Minski petition (p. 6) that the decision below conflicted with that of the Sixth Circuit in the *Delia* and *Minski* cases was erroneous. It was based on the opinion of the court below, before the record was served on us.

V

Petitioner's next complaint (Pet. 8, Br. 25–26) is that the Act is discriminatory in that its definition of "crime of violence" turns in part on state laws which vary from place to place both in the definition of the crime and in the punishment, both of which may be material in determining whether a crime is or is not one of "violence," so that the same previous acts which in one state bring a man within the instant statute would if committed in other states leave him outside the statute. To this the short answer was given by the court below, that "Practical uniformity is enough" (R. 50). Meticulous accuracy of classification is not required, and failure to meet all like evils, under a classification patently directed at a substantial and identifiable bulk of the evil, will not invalidate the classification. *United States* v. *Carolene Products,* 304 U. S. 144, 151; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 400. See also *McDonald* v. *Massachusetts,* 180 U. S. 311, 313.

VI

Petitioner also urges (Pet. 8, Br. 26–29) that his previous Puerto Rican conviction of "aggravated assault and battery" is not conviction of crime of violence as that term is defined in Section 1 (6) of the Act, and that his demurrer to

the indictment should therefore have been sustained. Section 1 (6) defines "crime of violence" to include:

> * * * assault with intent to commit any offense punishable by imprisonment for more than one year.

Petitioner's contention rests on the idea that "aggravated assault and battery," notwithstanding that it carries under local law a punishment of up to two years' imprisonment, is not "assault with intent to commit" anything, but is a crime which is simply not enumerated in the instant statute.

The statute under which petitioner's Puerto Rican conviction took place, however, defines an assault as "any *attempt* to commit a battery, or any threatening gesture showing in itself an immediate *intention,* coupled with an ability to commit a battery"; defines a battery as the use of unlawful violence to the person with "*intent* to injure him," and defines an "aggravated assault and battery" as one committed under certain stated circumstances. (Puerto Rican Act of March 10, 1904, sections 1 and 6.) (Italics supplied. The statute is reprinted in the petition, pp. 34 *et seq.*) As the court below pointed out, every "aggravated assault and battery" is thus at the very minimum an assault which is coupled with an intent to commit the sort of battery punishable by more than one year's imprisonment.

Just as a conspiracy charge (*Heike* v. *United States,* 227 U. S. 131, 144), or an attempt (Penal Code of Puerto Rico (1937) sec. 49), lies notwithstanding the consummation of the crime, so is the completed assault and battery subject to analysis as an assault with such intent. It is the substance of the crime rather than the variant choices which local legislatures may make in expressing it, which must be determinative under a test which is to operate throughout all the states and territories.

VII and VIII

Petitioner's final contention as to the sufficiency of the indictment is that it does not sufficiently allege receipt (Counts I and III) and transportation (Counts II and IV) in interstate commerce. All four counts are drawn in a form alleging that the objects involved "had theretofore been shipped and transported in interstate commerce" (R. 2–4). The bare statement of the contention in the petition, p. 8, is ampified in the brief, pp. 29–30, as based on a distinction between activity by petitioner *in* interstate commerce and activity merely *after* independent interstate commerce.

The point is not argued by petitioner with respect to Counts II and IV. Had it been properly raised on demurrer, it might have had weight at least as to those two counts, for they

relate to transportation under section 2 (e), which makes it unlawful to "transport * * * *in* interstate or foreign commerce." [Italics supplied.] But as to Counts I and III, the form used in the indictment is an adequate paraphrase of the statutory language, charging receipt under section 2 (f), for the statutory word "receive" itself, as we showed in our brief in *United States* v. *Frank Delia,* p. 12, imports consummation of a transaction which prior thereto was incomplete. The recital in the bare terms of section 2 (f) was therefore adequate pleading of the counts which sounded under that subsection, and a further recital that the receipt took place *in* interstate commerce would have been merely redundant. *Potter* v. *United States,* 155 U. S. 438, 444.

Petitioner is not, however, in position to avail himself of any insufficiency of the indictment with respect to the point he now stresses, for the reason that claim of insufficiency of the indictment is open to him on review only because of the overruling of his demurrer to the indictment, and the demurrer to the indictment on this score gave no inkling of the ground on which the point is now sought to be rested. On its face the demurrer was without merit, for it merely asserted that the indictment was defective for want of allegations that were patently present in it or were matter of evidence at best. The demurrer

recited that the indictment failed to state facts sufficient to constitute a crime because, among other things:

> (c) The first and third counts of the indictment do not allege facts sufficient to show a shipping or transportation in interstate or foreign commerce or to show knowledge on the part of the defendant of the interstate character of the goods, if any.
>
> (d) The second and fourth counts of the indictment do not allege facts sufficient to show a shipping or transportation in interstate or foreign commerce, or to show any transportation by defendant (R. 5).

The indictment was not open to any of the four objections recited in the demurrer. Counts I and III, and Counts II and IV, alike, stated that there had occurred an interstate shipping or transportation which "had theretofore been shipped and transported in interstate commerce") (R. 2–4). To plead knowledge of the shipment or transportation in Counts I and III would have been to plead evidence, and insufficient evidence at that because mere knowledge of an independent prior interstate shipment or transportation would not suffice for liability without participation therein. Finally, transportation by petitioner (that he "did * * * transport" (R. 2, 4)) was specifically pleaded in Counts II and

IV. Thus because of petitioner's failure to point out the matter now complained of, the trial court had no occasion to treat the demurrer as being anything other than what it purported to be on its face, an overtechnical complaint of want of allegations which in fact appeared in the indictment or were matters of evidence which did not need to appear, comparable to the *pro forma* generalities which next followed in the demurrer:

> 2. That said indictment is unintelligible because of uncertainty;
>
> 3. That said indictment is ambiguous because it is uncertain and unintelligible (R. 5).

Since the actual evidence in the case was insufficient to raise the distinction now asserted by petitioner in his brief, reviewing a demurrer which, like the request for charge condemned in *Ulman* v. *Manheimer,* 249 Fed. 691, 696 (C. C. A. 6), "covers up as much as it discloses of the contention afterwards made," would amount to sanctioning an entrapment of the trial judge. Cf., on the requirement that demurrers to indictments make a clear statement of the specific ground on which they rest, *United States* v. *Reece,* 280 Fed. 913 (D. Idaho); *Hedderly* v. *United States,* 193 Fed. 561 (C. C. A. 9).

IX

Petitioner contends (Pet. 9, Br. 31–32) that there was no evidence that the ammunition which was the subject of Counts I and II was "ammunition" within the definition of Section 1 (8) of the Act. That definition excludes many types of cartridges, shells and bullets, being in general restricted to loads suitable for pistols and revolvers, and petitioner asserts that there was insufficient evidence to determine whether the ammunition involved was pistol or revolver ammunition or some other sort.

The indictment charged that on August 27, 1941, petitioner received (Count I) and transported (Count II), "a certain amount of revolver ammunition, to wit, approximately ten bullets" (R. 2). The principal evidence on the point is that on the date stated petitioner sent a friend to a local hardware store in Puerto Rico to purchase ten bullets for him, and the friend turned the bullets over to him (R. 23). But although there was evidence that petitioner owned a .38 calibre revolver (R. 37), the one alleged and proved under Counts III and IV, there was no direct evidence on whether the bullets purchased were for that gun, nor whether petitioner owned any other guns. The court below held that there was sufficient evidence that the bullets were .38s, reciting that

> The evidence is that on August 27 the appellant sent a friend into a hardware store to get him ten rounds of ammunition; that the friend entered the store, asked for ten rounds of ammunition for the appellant giving the storekeeper the appellant's nickname; that the appellant was well known in the store and that it was commonly known that he customarily carried a .38 caliber revolver; and that the friend brought ten rounds of ammunition out of the store and gave it to the appelland who carried it away. * * * (R. 51–52.)

Petitioner asserts, and we agree, that the record contains no such details, being restricted to the facts which we have stated as to the acquisition of the bullets on August 27, 1941, and to the fact that it was known among certain of petitioner's intimates that he customarily carried a .38 revolver and displayed it openly (R. 22, 23). But whether these circumstances are sufficient to ground a circumstantial inference that the bullets acquired on the 27th were .38s need not be considered, nor have we made any attempt to ascertain whether the record has been diminished, for possession and transportation of .38 bullets on August 30, three days later, was proved. The evidence as to August 30, which proved the possession and transportation of the gun (Counts III and IV), was that he then fired the gun (R.

21–24). The proof of the firing of the gun supplies clear evidence that petitioner then possessed and transported the ammunition he then shot out of the gun, and since the gun was a .38 pistol there can be no question but that the ammunition was .38 pistol ammunition within the statutory definition. The only difference between allegation and proof would be three days of time, and an indefinite number rather than the specifically alleged "ten" bullets. This is of course an immaterial variance. *Ledbetter* v. *United States,* 170 U. S. 606; *Gleckman* v. *United States,* 80 F. (2d) 394, 400–401 (C. C. A. 8).

X

Petitioner's last contention (Pet. 9, Br. 33) is that "There was, as to the ammunition, only one transaction shown," and that therefore "if there was a crime committed it was one and not two." If we understand this contention correctly, it is that the same evidence cannot be used to make out the two different crimes of receiving under Section 2 (f) and of transporting under Section 2 (e). No cases are cited by petitioner on the point, although he remarks (Br. 33) "The same act may constitute an infringement of two different statutes but the same statute cannot be infringed in two different ways by only one act." The court below regarded the point as too tenuous for discussion (R. 52). It

may be shortly dismissed by pointing to the common and sanctioned practice of joinder of multiple counts in bootlegging cases, where the facts which prove one count lead to a circumstantial inference as to another. *Rossi* v. *United States*, 289 U. S. 89. Proof of transportation of ammunition contrary to Section 2 (e) patently involves proof of possession, which in turn leads to a presumption of receipt contrary to Section 2 (f).

CONCLUSION

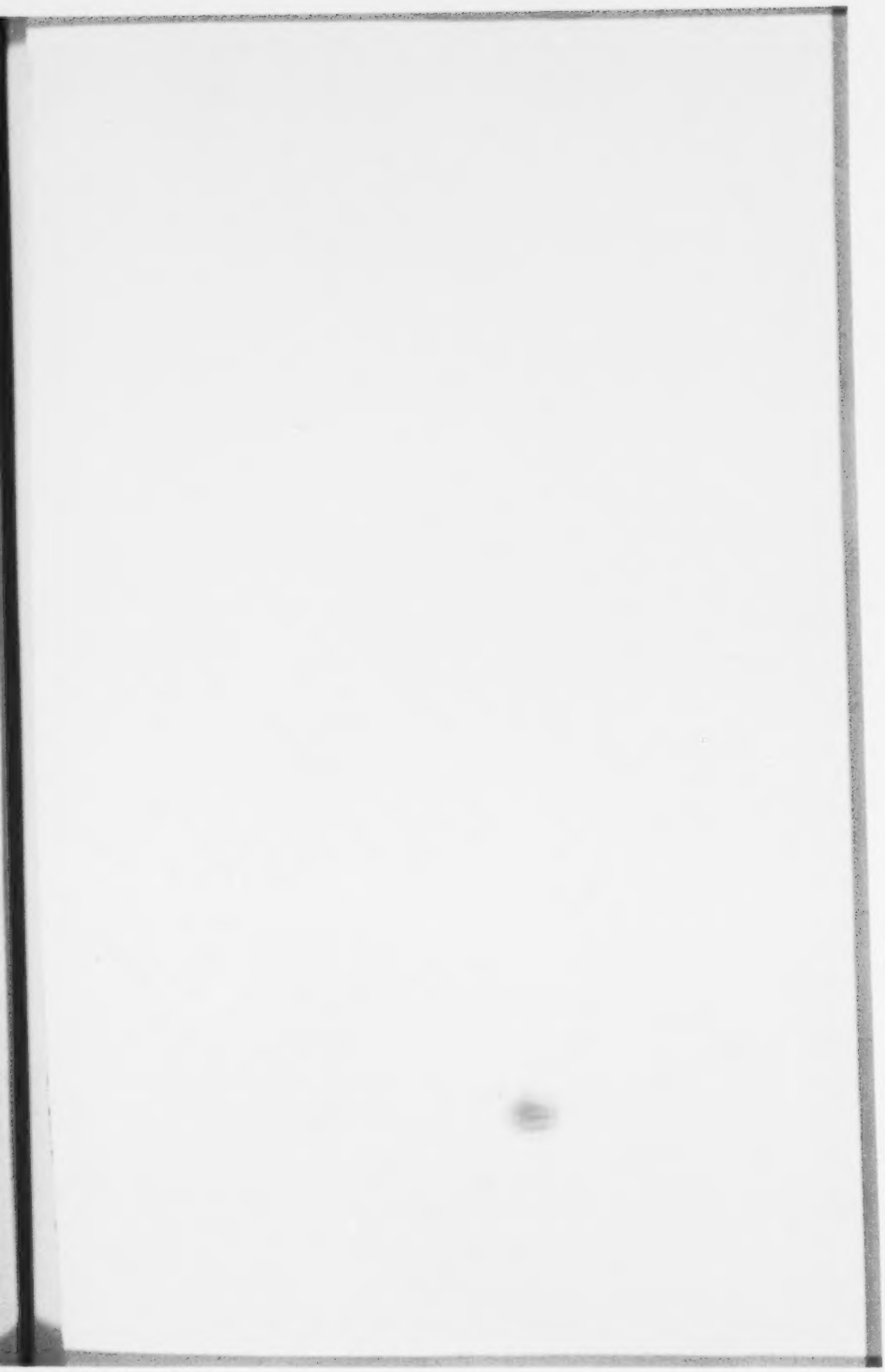
The decision below was correct, there is no conflict of decisions nor any question of general importance involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

IRWIN L. LANGBEIN,
VALENTINE BROOKES,
Attorneys.

MARCH 1943.



APPENDIX

Article I, Section 8, Clause 3 of the Constitution in pertinent part provides:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce with foreign Nations, and among the several States * * *.

Article I, Section 9, Clause 3 of the Constitution in pertinent part provides:

> No * * * ex post facto Law shall be passed.

Article IV, Section 3, Clause 2 of the Constitution in pertinent part provides:

> The Congress shall have Power to * * * make all needful Rules and Regulations respecting the Territory * * * belonging to the United States * * *.

The Second Amendment of the Constitution provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

The Fifth Amendment of the Constitution in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

FEDERAL FIREARMS ACT

(52 Stat. 1250; 15 U. S. C. 901 *et seq.*)

SECTION 1 (2) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia.

SECTION 1 (6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

SECTION 1 (8) The term "ammunition" shall include only pistol or revolver ammunition. It shall not include shotgun shells, metallic ammunition suitable for use only in rifles, or any .22-caliber rimfire ammunition.

SECTION 2 (e) It shall be unlawful for any person * * * who has been convicted of a crime of violence * * * to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

SECTION 2 (f) It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm or am-

munition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this act.

U. S. GOVERNMENT PRINTING OFFICE: 1943